

U.S. Department of Labor

Board of Alien Labor Certification Appeals
1111 20th Street, N.W.
Washington, D.C. 20036



DATE: FEBRUARY 28, 1989
CASE NO. 88-INA-360

IN THE MATTER OF

EMPIRE MARBLE CORP.,
Employer

on behalf of

EDWARD NOVOTNY,
Alien

Appearance: Varda Gillon, Esquire
For the Employer

BEFORE: Litt, Chief Judge; Vittone, Deputy Chief Judge; and
Brenner, DeGregorio, Guill, and Schoenfeld
Administrative Law Judges

LAWRENCE BRENNER
Administrative Law Judge

DECISION AND ORDER

The above-named Employer requests review pursuant to 20 C.F.R. §656.26 of the United States Department of Labor Certifying Officer's denial of a labor certification application. This application was submitted by the Employer on behalf of the above-named Alien pursuant to Section 212(a)(14) of the Immigration and Nationality Act, 8 U.S.C. 1182(a)(14) ("the Act").

Under Section 212(a)(14) of the Act, an alien seeking to enter the United States for the purpose of performing skilled or unskilled labor is ineligible to receive labor certification unless the Secretary of Labor has determined and certified to the Secretary of State and to the Attorney General that, at the time of application for a visa and admission into the United States and at the place where the alien is to perform the work: (1) there are not sufficient workers in the United States who are able, willing, qualified and available; and (2) the employment of the alien will not adversely affect the wages and working conditions of United States workers similarly employed.

An employer who desires to employ an alien on a permanent basis must demonstrate that the requirements of 20 C.F.R. Part 656 have been met. These requirements include the responsibility of the employer to recruit U.S. workers at the prevailing wage and under prevailing

working conditions through the public employment service and by other reasonable means in order to make a good faith test of U.S. worker availability.

This review of the denial of labor certification is based on the record upon which the denial was made, together with the request for review, as contained in an Appeal File ("AF") and any written arguments of the parties. 20 C.F.R. §656.27(c).

Statement of the Case

The Employer, Empire Marble Corp., filed the application for labor certification on behalf of the Alien, Edward Novotny, on March 1, 1986, for the position of Operations Supervisor (AF 16). The job duties, as described by the Employer in the ETA 750A, included directing and coordinating manufacturing and sales, and approving requisitions of supplies and personnel. The requirements for the position were ten years experience as a manager or five years experience as a manager and an MBA in management (AF 5, 16).

The Employer recruited for the position in October and November of 1986. As a result of the recruitment the Employer received several resumes, including that of John Mazzola (AF 17, 21). In a January 13, 1987 letter to the New Jersey Employment Service the Employer stated that he rejected Mazzola, as well as several other applicants (AF 18-20). Specifically, the Employer stated that ""while his resume seemed perfect," Mazzola appeared to be a "paper man" rather than a "real accomplisher", that the Employer "did not feel confident and comfortable with him" and that Mazzola "didn't strike [the Employer] as capable of handling this position" (AF 19). The Employer also stated that Mazzola appeared for the interview without an appointment, exhibiting poor judgment.

In her November 30, 1987 Notice of Findings (NOF), the Certifying Officer (C.O.) proposed to deny the application for labor certification (AF 40-42). The C.O. asserted that the Employer violated section 656.21(b)(7) by unlawfully rejecting Mazzola for "subjective or personality reasons." The C.O. said that upon reviewing Mazzola's background it appears that he met the Employer's minimum requirements for the position. The C.O. directed the Employer to document the lawful job-related reasons for rejecting Mazzola.

The Employer, in its rebuttal dated December 11, 1987, stated that all of its personnel records, resumes and written responses were destroyed in a fire (AF 49).¹ The Employer requested the C.O. to send it a copy of Mazzola's resume and its written response in order for the Employer to reinterview the applicant, since it will have other positions to fill in the future.

¹ As noted by the C.O. in her NOF, the Employer's Paterson, New Jersey factory complex was destroyed by fire on August 1, 1987 (AF 39,41). The C.O. asserted in the NOF that as a result of the fire no job opportunity existed and proposed to deny the application for labor certification on that additional ground. As the case can be disposed of on an alternative issue we need not decide whether a job opportunity existed.

The C.O. issued her Final Determination denying the application for labor certification on January 19, 1989 without addressing the Employer's request for copies of the resume and the response (AF 53-54). The C.O. stated that reinterviewing Mazzola would be unproductive because, due to the Employer's fire, an immediate job opening did not appear to exist. At the same time, the C.O. restated the Employer's reasons for rejecting Mazzola, as expressed in the Employer's January 13, 1987 letter to the state job service. The C.O. concluded that because the Employer's reasons for rejection were subjective in nature another interview of the applicant would be futile.

The Employer filed a timely Request for Review dated March 16, 1988 (AF 56-96) and subsequently filed a brief dated September 2, 1988. The C.O. did not file a brief.

Discussion

The issue presented on appeal is whether the Employer violated section 656.21(b)(7) in its rejection of Mazzola. Section 656.21(b)(7) requires that "[i]f U.S. workers apply for the job opportunity, the employer shall document that they were rejected solely for lawful job-related reasons." In the instant case the C.O. alleged that the Employer violated the subsection by rejecting Mazzola for "subjective or personality reasons" (AF 42).

The Employer, in its Request for Review and again in its Appeal Brief, argues first that it needed Mazzola's resume and the Employer's notes, from the C.O., (as the Employer's copies were destroyed in the fire), in order to recollect additional details concerning the applicant's interview (AF 91; Brief at 2). This argument, however, does not have merit. The C.O., in her NOF, proposed to deny certification on the ground that the Employer rejected Mazzola for subjective reasons. Given the ground for denial of certification, and the fact that the Employer had agreed that Mazzola's resume, at least, satisfied the job requirements set forth in the application (AF 19), it was highly improbable that transmittal of the resume and the response would lead to the discovery of new support for the Employer's stated reasons for rejecting Mazzola.²

The Employer also asserts on appeal that it submitted a lawful job-related reason for rejection to the state employment agency, namely that Mazzola was rejected because he appeared for an interview without an appointment (AF 19). The Employer argues on appeal that Mazzola demonstrated himself to be incapable of following business codes and rules by such action (AF 3-4; Brief at 3-4). It appears, however, that Mazzola, unlike every other interviewee, was not scheduled for a particular date for an appointment with the Employer. While the Employer informed the state employment agency by letter of the dates of interviews it scheduled for five

² We note that the Employer, in both the Request for Review and the Appeal Brief, supplied additional grounds for rejecting Mazzola without the benefit of the applicant's resume and its responses (AF 90-91; Brief at 3-4). These different grounds for rejection were not set forth before the C.O., either in rebuttal, or earlier in the Employer's report to the local job service. Pursuant to section 656.26(b)(4), we do not consider evidence submitted for the first time on appeal to this Board, or new arguments based on such evidence.

other applicants, it stated the date of Mazzola's interview as "11/ /86" (AF 17). Given the ambiguity of the interview date, we are unable to find that the U.S. applicant, by appearing without a specific appointment, acted in such a manner so as to merit rejection.

Finally, we must address the validity of the Employer's other initial reasons for rejection; that Mazzola was a "paper man" rather than a "real accomplisher", that the Employer "did not feel confident and comfortable with him" and that Mazzola "didn't strike [the Employer] as capable of handling this position" (AF 19). The C.O. rightly concluded that such reasons for rejection were subjective and therefore non-lawful reasons for rejection (AF 40-42, 52-54). This Board has held that an Employer's subjective opinions concerning a U.S. applicant are not valid job-related reasons for rejection of the U.S. worker. See R. L. Fender, D.D.S., 87-INA-657 (Feb. 3, 1988); Southpoint Seafood Market, 87-INA-614 (Jan. 20, 1988). Here, the Employer relied on subjective considerations, such as its belief that Mazzola was a "paper man," (even though it admitted that Mazzola's resume "seemed perfect"), as well as feeling uncomfortable and not confident in him. Such reasons do not constitute lawful job-related reasons for rejection. Thus, we find that the Employer violated section 656.21(b)(7).

ORDER

The Final Determination of the Certifying Officer denying labor certification is AFFIRMED.

For the Board:

LAWRENCE BRENNER
Administrative Law Judge